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State Court Administrative Office
**Child Welfare Services**
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Daniel J. Wright
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# MEMORANDUM

DATE: March 5, 2009

TO: Circuit Court Judges
Presiding Family Division Judges

cc: Circuit Court Administrators
Family Division Administrators

FROM: Daniel J. Wright

RE: SCAO Administrative Memorandum 2009-02
Obtaining the Child's Opinion at Permanency Planning Hearings

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Michigan Public Act 200 of 2008, which became effective July 11, 2008, requires that when conducting a permanency planning hearing, the court must try to ascertain the child's views regarding the child's permanency plan. The legislature enacted this law in response to the federal Child and Family Services Improvement Act of 2006, which required states to develop procedural safeguards to ensure that courts conduct age-appropriate consultations with foster children.

This memorandum informs courts of the new requirement and offers recommendations for developing appropriate consultation procedures. If you have any questions, or would like additional information regarding this memorandum, please contact Kelly Howard at howardk@courts.mi.gov or Angel Sorrells at sorrellsa@courts.mi.gov or call 517-373-8036.

# A. Background

The federal Child and Family Services Improvement Act of 2006 modified the definition of "case review system" to require states to enact procedures to ensure that courts conducting foster care permanency planning hearings consult with the child, in an age-appropriate manner, regarding the child's permanency plan.

42 USC 675(5)(c), as amended by Public Law 109-288[1] requires a state's foster care case review system to include:

> … procedural safeguards to assure in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child.

The Congressional Record's legislative history of this provision includes this statement: "[E]ach child deserves the opportunity to participate and be consulted in any court proceeding affecting his or her future, in an age-appropriate manner."[2] The federal law does not prescribe a particular manner in which the consultation must occur, so states have some discretion in determining appropriate consultation methods. The main objective is to give children an opportunity to express their opinions *in their own words*, which will convey to the children that their opinions are valuable to the court.

Michigan adopted the federal requirement with the enactment of 2008 PA 200, which amended MCL 712A.19a(3), with immediate effect on July 11, 2008. The new Michigan law requires courts to obtain the child's views regarding his or her permanency plan during each permanency planning hearing. Neither state nor federal law specify exactly how courts should obtain the child's input.

# B. Implementation issues

### 1. Reasonable Parameters

The federal law does not restrict the consultation requirement to children of a minimum age or educational level. But a child of insufficient age and capacity (e.g., an infant) does not have the ability to communicate his or her opinion regarding a permanency plan. Therefore, courts may establish reasonable parameters that suspend the consultation requirement for children who are nonverbal, too young to speak, or otherwise unable to communicate in an age-appropriate manner.

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[1] At the time of writing this memorandum, the new law has not yet been codified in the US Code online. Readers may refer to Public Law 109-288 for the text of the law.

[2] Congressional Record, September 26, 2006, H7384.

## 2. Consultation Methods

In response to a request for clarification, the federal government published a Question and Answer.[3] It essentially states that any action that allows the court to obtain the views of the child regarding the permanency plan would meet the requirement.

SCAO recommends that each child be offered the opportunity to attend the hearing and speak openly in court. If the child declines this offer, then courts should adopt more flexible consultation methods based on the specifics of the case. Some examples of consultation methods might include:

a. **Allowing the child's Lawyer Guardian Ad Litem (LGAL) to communicate the child's opinions to the court.** It is essential that the LGAL provide the *child's* view to the court, even if the LGAL disagrees with the child or believes that the child's opinion is not in the child's best interests.

b. **Allowing the child's caseworker to communicate the child's opinions to the court.** It is essential that the caseworker provide the *child's* view to the court, regardless of what the caseworker believes to be in the child's best interests.

c. **Allowing the child to express an opinion in writing to the court, LGAL, or caseworker.** A court hearing can intimidate a child. Allowing the child to express his or her opinions in writing, if so desired, eliminates the pressures of speaking in court and may result in a more thoughtful analysis.

If a child selects an alternative communication method, SCAO recommends that courts inquire if the child was offered the opportunity to appear in court and speak, and if so, by whom. If the Indian Child Welfare Act (ICWA) applies, the caseworker must follow that procedure to meet the "active efforts" requirement in the ICWA.

## 3. Consulting with Young Children

Children of varying ages can participate and express their views in a variety of ways. Consultation should occur with every child who is developmentally able to express an opinion.

## 4. Local Court Policies

Court policies should specify who can seek the child's opinion and who can speak for the child. If the child attends the hearing and speaks to the court, the policy should detail who should prepare the child for that appearance.[4]

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[3] See Appendix A: Children's Bureau Question and Answer.

[4] Courts are encouraged to take the lead locally to create a protocol for their county. Some communities may find that the LGAL is best suited to educate the child about the right to attend the hearing and speak openly. Others may find that the responsibility is best assigned to the caseworker. Courts should encourage collaboration to create a sound local policy.

# Appendix A
# Department of Health and Human Services
# Children's Bureau Question and Answer

**Section 8.3C.2c TITLE IV-E, Foster Care Maintenance Payments Program, State Plan/Procedural Requirements, Case Review System, Permanency Hearings**

Question: In what way can a State meet the requirement for the court holding a permanency hearing to conduct age-appropriate consultation with the child in section 475(5)(C)(ii) of the Social Security Act (the Act)?

Answer: Any action that permits the court to obtain the views of the child in the context of the permanency hearing could meet the requirement. Section 475(5)(C)(ii) of the Act tasks the State with applying procedural safeguards to ensure that the consultation occurs. However, the statute does not prescribe a particular manner in which the consultation with the child must be achieved which provides the State with some discretion in determining how it will comply with the requirement.

We do not interpret the term 'consult' to require a court representative to pose a literal question to a child or require the physical presence of the child at a permanency hearing. However, the child's views on the child's permanency or transition plan must be obtained by the court for consideration during the hearing. For example, a report to the court in preparation for a permanency hearing that clearly identifies the child's views regarding the proposed permanency or transition plan for the child could meet the requirement. Also, an attorney, caseworker, or guardian ad litem who verbally reports the child's views to the court could also meet the requirement. Information that is provided to the court regarding the child's best interests alone are not sufficient to meet this requirement. Ultimately, if the court is not satisfied that it has obtained the views of the child through these or any other mechanism, it could request that the child be in the courtroom, or make other arrangements to obtain the child's views on his/her permanency or transition plan.

- **Source/Date:** 07/22/07
- **Legal and Related References**: Social Security Act – section 475(5)(C)(ii)